

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION

DAVID WAYNE BURGE

PLAINTIFF

VS.

CIVIL ACTION NO.3:08cv306-JCS

CHRISTOPHER EPPS, Commissioner,  
Mississippi Department of Corrections

DEFENDANT

MEMORANDUM OPINION AND ORDER

This action, brought pursuant to 42 U.S.C. § 1983, is before the court on the parties' cross-motions for summary judgment. An order of reference to the undersigned was previously entered herein, and the parties have consented to exercise of jurisdiction by the undersigned. Having considered the motions, the court concludes that Plaintiff's motion should be denied and Defendant's motion granted.

Plaintiff is a state inmate in the custody of the Mississippi Department of Corrections (MDOC). In his complaint, he alleges that his sentence is being incorrectly calculated because MDOC has failed to credit him for time served in MDOC's drug and alcohol treatment program. Plaintiff requests that this court order MDOC to properly credit this time toward his sentence and to award him compensatory damages.

Relief in the form of an order directing MDOC to credit his sentence is not available under § 1983. A prisoner's claim attacking his current confinement or alleging entitlement to accelerated release from incarceration is properly pursued in a petition for habeas corpus relief, not in an action pursuant to § 1983. *Carson v. Johnson*, 112 F.3d 818, 821-21 (5<sup>th</sup> Cir. 1997). Accordingly, Defendant is entitled to judgment as a matter of law on this portion of Burge's claim.

Furthermore, as Defendant points out, Plaintiff has alleged no specific conduct on the part of Defendant indicating that Defendant was somehow personally involved in the failure to properly calculate his sentence or alleging that Epps committed any wrongful act. Thus, his claim against Epps in his individual capacity necessarily fails as a matter of law. To the extent that Plaintiff is attempting to hold Epps liable in his official capacity, that attempt runs foul of the Eleventh Amendment, as that portion of the Constitution bars suits in federal court against state officials in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

For these reasons, the court concludes that there is no genuine issue of material fact and that Defendant is entitled to judgment as a matter of law. A separate judgment will be entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED, this the 23<sup>rd</sup> day of November, 2009.

/s/ James C. Sumner  
UNITED STATES MAGISTRATE JUDGE